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No. 80-1228

In the Supreme Court of the United States

OCTOBER TERM, 1980

LOUIS S. BULLARD, PETITIONER

v.

WILLIAM H. WEBSTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Blue v. *Bureau of Prisons*, 570 F. 2d 529 7

Board of Regents v. *Roth*, 408 U.S. 564 5

Bramley v. *Webster*, 476 F. Supp. 351 5

Cox v. *United States Department of Justice*, 601 F. 2d 1 6

Kletscha v. *Driver*, 411 F. 2d 436 5

LaSalle Extension University v. *FTC*, 627 F. 2d 481 7

Leefer v. *Administrator, NASA*, 543 F. 2d 209 6

Local 2855, AFGE (AFL-CIO) v. *United States*, 602 F. 2d 574 4

Sheehan v. *Army and Air Force Exchange Service*, 619 F. 2d 1132, petition for cert. pending, No. 80-1437 (filed Feb. 23, 1981) 5

Vermont Low Income Advocacy Council v. *Usery*, 546 F. 2d 509 7

Weir v. *Muller*, 527 F. 2d 872 5

Wisniewski v. *United States*, 353 U.S. 901 5

Constitution and statutes:

United States Constitution First Amendment 6

Administrative Procedure Act, 5 U.S.C. 701(a)(2) 1, 4

Freedom of Information Act, 5 U.S.C. 552(a)(4)(E) 6

Page

Constitution and statutes—(Continued):

Privacy Act of 1974, 5 U.S.C. 552a(g)(3)(B) 6

Veteran Preference Act, 5 U.S.C. 7511 *et seq.* 6

5 U.S.C. 7511(2) 6

5 U.S.C. 7501(a) 6

28 U.S.C. 536 6

28 U.S.C. 1331 5

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Petitioner, a Special Agent of the Federal Bureau of Investigation, contends that the court of appeals erred in concluding that the decision by the FBI to transfer him from the duty station he prefers to another duty station is "agency action * * * committed to agency discretion by law" (5 U.S.C. 701(a)(2)) and is thus not judicially reviewable under the Administrative Procedure Act.

1. From 1968 to March 1978, petitioner was assigned to the FBI office in Gulfport, Mississippi. In November 1977, petitioner was involved in an incident that led to charges of misconduct. The pertinent facts are as follows: Petitioner was assigned to protect a witness in a Gulfport motel (II R. 84-85). Petitioner's shift ended at midnight (II R. 86). At approximately 12:15 a.m., a relief agent found petitioner lying down (fully clothed) next to the witness on her bed (II. R. 87). The relief agent told petitioner to leave. Some time

later, petitioner drove home in a government vehicle while apparently in a somewhat intoxicated state (Pet. App. 10a).[1]

After a review of petitioner's conduct by FBI headquarters he was censured, placed on probation and suspended for five days without pay (II R. 90). Based on the incident, the acting Special Agent in charge of the Jackson, Mississippi office recommended that petitioner be transferred to another office. The transfer was not intended as a further punitive measure, but was recommended because of the belief that petitioner could no longer work effectively in the Jackson Division (II R. 88, 116-117, 122-123, 136). FBI headquarters ordered petitioner transferred to Newark, New Jersey, effective March 1, 1978. The Newark office was chosen because it was understaffed and because it needed accountants (petitioner is an accountant) (Pet. App. 3a).

2. On January 17, 1978, petitioner filed a Freedom of Information Act and Privacy Act request for all documents relating to his case. On February 13, 1978, the FBI responded that his request would be handled in due course. Petitioner then requested the FBI to delay his transfer until he received the documents. This request was denied.

Thereafter, petitioner brought suit in the United States District Court for the Southern District of Mississippi, seeking to enjoin his transfer pending his appeal of the transfer to the FBI Director. The district court initially entered temporary restraining orders barring the transfer until petitioner could obtain the documents necessary to pursue his administrative appeal.

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[1]Petitioner offered the explanation that the witness had insisted on going to a bar for a drink and that he felt it was his duty to accompany her. After the conclusion of his shift at midnight petitioner took a drink. Since the drink made him dizzy, he lay down on the witness' bed (although other FBI agents occupied an adjoining room, where presumably he could have rested (II R. 82-90)).

At a hearing on the question whether an injunction should issue, petitioner admitted that in 1962 he had agreed to the following written conditions:

> It is understood you are to proceed on orders to any part of the United States or its possessions where the exigencies of the service may require, and it should be clearly understood that you will be completely available for any assignment whatever and whenever the needs of the service demand * * *. Further, you cannot expect assignment to an office of your own preference.

(II R. 32). Petitioner further admitted that he had initialed a similar agreement in 1977 (II R. 33-34). He claimed, however, that there had been an informal unwritten understanding that a senior agent would be assigned to the office of his preference (II R. 32). Following the hearing, the district court, on March 17, 1978, enjoined petitioner's transfer pending the exhaustion of his administrative appeal (I R. 20-22).

On March 24, 1978, the FBI represented that petitioner had received all of the documents that he had requested. Thereafter, on July 28, 1978, the FBI Director denied petitioner's administrative appeal of his transfer (Pet. App. 3a-4a).

After further judicial proceedings, the district court entered a final judgment permanently enjoining the transfer (Pet. App. 7a-20a). The court rejected the government's contention that it was without jurisdiction to review the FBI's decision to transfer petitioner (*id.* at 17a) and concluded that the transfer was not supported by substantial evidence and was arbitrary and capricious (*id.* at 19a). In addition, the court denied petitioner's request for attorney's fees (*id.* at 19a-20a).

The court of appeals reversed in part (Pet. App. 1a-6a; 623 F. 2d 1042). The court ruled that the FBI's decision to

transfer an agent is unreviewable under the Administrative Procedure Act because it is committed to agency discretion by law (Pet. App. 4a-6a). Furthermore, the court concluded that petitioner could not assert a due process claim because he did not have a cognizable property interest in remaining at the Gulfport office in light of his agreement that as a condition of his employment he would be subject to assignment anywhere in the United States. Accordingly, the court of appeals reversed the judgment of the district court granting the injunction. On petitioner's cross-appeal, the court of appeals affirmed the district court's denial of attorney's fees (*ibid.*).

3. The decision of the court of appeals is correct and does not conflict with decisions of this Court or any court of appeals. Further review is therefore unwarranted.

a. Petitioner contends (Pet. 7-9, 20) that a decision to transfer an FBI special agent is judicially reviewable under the Administrative Procedure Act. That Act, however, does not authorize judicial review of personnel actions that are committed entirely to agency discretion. 5 U.S.C. 701(a)(2). In determining whether the transfer decision is committed to agency discretion and hence unreviewable, the court of appeals focused on several factors, including (1) the degree of discretion given an agency in an area of operation; (2) the degree to which political, managerial and economic choices, which are inherently not subject to review, are involved; and (3) the extent to which the challenged action is subject to agency expertise (Pet. App. 5a). See *Local 2855, AFGE (AFL-CIO)* v. *United States*, 602 F. 2d 574, 578-580 (3d Cir. 1979). The court concluded that agency transfer decisions are based on "complex considerations of agency requirements as well as the ability and personal characteristics of the employee" (Pet. App. 6a). The court therefore held that the merits of a transfer decision are not judicially reviewable (*id.* at 5a, 6a). This holding is consistent with the

decisions of other courts that have considered this issue. See, *e.g.*, *Kletschka* v. *Driver*, 411 F. 2d 436 (2d Cir. 1969); *Bramley* v. *Webster*, 476 F. Supp. 351 (E.D. Pa. 1979).[2]

b. Petitioner's remaining claims are plainly without merit. Petitioner contends (Pet. 10) that he had a property interest in his duty assignment and that the transfer deprived him of that property interest without due process of law. But petitioner points to no statutory or regulatory provision indicating any entitlement. On the contrary, as the court of appeals noted (Pet. App. 6a), petitioner consented to written conditions specifying that he could not expect assignment to the office of his preference. Petitioner's unsubstantiated suggestion that he understood that senior agents could remain in their office of preference is insufficient to give rise to a cognizable property interest. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972).[3]

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[2]In any event, in light of the incident related above, it cannot reasonably be contended that the FBI's decision to transfer petitioner out of the Jackson Division was arbitrary or capricious.

[3]Petitioner's assertion (Pet. 20-22) of an intra-circuit conflict is incorrect and does not, in any event, warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In *Weir* v. *Muller*, 527 F. 2d 872 (5th Cir. 1976), the plaintiff brought a *Bivens*-type action, claiming that federal officials and two federal agencies had deprived him of due process in an investigation leading to his criminal prosecution. The court of appeals simply held that the district court had federal question jurisdiction under 28 U.S.C. 1331.

Sheehan v. *Army and Air Force Exchange Service*, 619 F. 2d 1132 (5th Cir. 1980), petition for cert. pending, No. 80-1437 (filed Feb. 23, 1981), is also inapposite. *Sheehan* involved a suit by a former employee of a military exchange service for wrongful discharge. The Fifth Circuit found that the employee had an implied-in-fact contract with the exchange service that the service would adhere to certain regulations imposing procedural requirements for employee dismissals. There is no basis in the present case for a claim that petitioner had an implied-in-fact contract with the FBI that he could only be transferred after certain procedural requirements were met. As the court of appeals correctly observed (Pet. App. 4a), "special agents of the FBI are not afforded

Petitioner's suggestion (Pet. 13-19) that the transfer violated his First Amendment rights is also insubstantial. In the courts below petitioner argued that his transfer was in retaliation for his request that his suspension be delayed (II R. 13; Pet. Ct. App. Br. 11, 18). He based this argument on the fact that the letter notifying him of his transfer was dated one day after he requested the delay. Apart from petitioner's bare suggestion of retaliatory motive, there is nothing in the record to indicate any attempt by the FBI to punish petitioner for protesting his transfer.

Finally, petitioner claims (Pet. 10) that he should have been awarded attorney's fees. The court of appeals correctly concluded (Pet. App. 6a), however, that petitioner was not entitled to attorney's fees under the Freedom of Information Act (even assuming that this suit may be viewed as an action under the FOIA). Attorney's fees may be awarded under the FOIA but the plaintiff must show that the institution of the suit was necessary for the release of the documents. 5 U.S.C. 552(a)(4)(E); see *Cox* v. *United States Department of Justice*, 601 F. 2d 1, 6 (D.C. Cir. 1979).[4] Here, as the court of appeals pointed out (Pet. App. 6a), there has been no showing that the FBI provided the documents only in response to the suit or that the FBI opposed furnishing the information. Petitioner has merely shown that he requested information and it was released. This is

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many of the procedural safeguards available to other government employees." FBI agents are part of the "excepted service" and thus, as a general matter, are not entitled to the procedural protections afforded to members of the competitive Civil Service. See 28 U.S. 536; 5 U.S.C. 7501(a). Moreover, petitioner is not entitled to the procedural protection of the Veterans Preference Act, 5 U.S.C. 7511 *et seq.* and, in any event, a transfer decision is not an "adverse action" (5 U.S.C. 7511(2)) to which the procedural protections of that Act apply. See *Leefer* v. *Administrator, NASA*, 543 F. 2d 209 (D.C. Cir. 1976).

[4]The Privacy Act of 1974 contains a similar provision, 5 U.S.C. 552a(g)(3)(B).

insufficient to establish an entitlement to attorney's fees. See *Vermont Low Income Advocacy Council* v. *Usery*, 546 F. 2d 509 (2d Cir. 1976). Moreover, even if petitioner had shown that the suit was necessary for release of the documents, he has not shown, nor could he show, that the district court abused its discretion in denying an award of attorney's fees. See *LaSalle Extension University* v. *FTC*, 627 F. 2d 481 (D.C. Cir. 1980); *Blue* v. *Bureau of Prisons*, 570 F. 2d 529 (5th Cir. 1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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